IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

NO. 563

MIRIAM G. HOSTETTER,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Miriam G. Hostetter, respectfully represents:

I. SUMMARY STATEMENT OF THE MATTER INVOLVED.

Your petitioner requests this court to review the judgment of the Circuit Court of Appeals of the Third Circuit in the above cause. The judgment was entered on June 27, 1940 and a petition for rehearing was denied on August 9, 1940.

The Circuit Court of Appeals affirmed the judgment entered in favor of the respondent and against the petitioner by District Judge Robert M. Gibson for the District Court for the Western District of Pennsylvania (R. 195).

Miriam G. Hostetter, the petitioner, on March 14, 1927, filed her individual income tax return for 1926, upon the cash receipts and disbursements basis, disclosing a tax payable of $32,599.77, and paid this sum on the same date to the Collector (2nd Find., R. 186).

On March 12, 1930, the petitioner filed a claim for a refund of the sum of $22,912.54 on the ground that she was entitled to a deduction, not claimed in her return, of the sum of $92,451.56 on account of inheritance tax paid by her to the State of California on her life interest in the estate of her deceased husband, D. Herbert Hostetter (3rd Find., R. 187).

Petitioner's claim for refund was rejected by the Commissioner on January 22, 1932 and petitioner filed this suit on January 20, 1934 under the Tucker Act to recover the sum of $22,912.54, with interest (4th Find., R. 187).

The deduction of the item of $92,451.56 from her gross income for 1926 would reduce the amount of income tax from the sum of $32,599.77 to $9,687.23, or a difference of $22,912.54, the amount of the refund claimed (Petition, Par. 8th, admitted by answer, R. 16).

D. Herbert Hostetter died on September 28, 1924 (5th Find., R. 181). He left to survive him his widow, Miriam G. Hostetter, petitioner; two sons, D. Herbert Hostetter, Jr., and Frederick G. Hostetter; and two daughters, Miriam H. Young and Helene Hostetter; and four grandchildren (5th Find., R. 181).

By his will (Ex. 1, R. 78) he appointed Miriam G. Hostetter, his wife, and Helene Hostetter, a daughter, and the Fidelity Title and Trust Company, of Pittsburgh, as his executors and trustees (R. 83).

In Paragraph Two of his will, testator devised the residue of his estate to his trustees, in trust, to pay one-half the income to his wife, the petitioner, during her life and one-eighth of the income to each of his four

children during their lives and to pay shares of the income for life to his four grandchildren after the death of their parents.

The California inheritance tax upon the estate of the testator was assessed by decree of the Superior Court of Los Angeles County dated January 20, 1926, which provided (Ex. 2, R. 87):

> "That the market value of the property subject to inheritance tax in the above entitled proceeding is $3,636,701.58; that the persons to whom said property passed from decedent, their relationship to decedent, *the value of their respective interests in said property, and the taxes to which the same are respectively liable,* are hereby assessed and fixed as follows: (Italics ours)

"Name and Relationship	Value of Interest	Tax
Miriam G. Hostetter, Widow	$ 941,179.63	$ 92,451.56
D. Herbert Hostetter, Jr., Son	542,926.73	44,801.21
Frederick G. Hostetter, Son	552,274.73	45,922.97
Miriam H. Young, Daughter	572,545.01	48,355.40
Helene Hostetter, Daughter	580,543.62	49,315.23
Frederick G. Hostetter, Jr., Gr. Son	111,807.97	3,476.56
Anna Hostetter, Gr. Daughter	111,807.97	3,476.56
Jane Hostetter, Gr. Daughter	111,807.96	3,476.56
Barbara Smith, Gr. Daughter	111,807.96	3,476.56
	$3,636,701.58	$294,752.61."

The report (Ex. 2, R. 91) of the inheritance tax appraiser was filed previously on January 5, 1926 and stated the tax in substantially the same language and form as the order of the Superior Court just quoted.

The receipt (Ex. 2, R. 95) of the County Treasurer issued for the tax on February 10, 1926 stated that the tax paid was upon the gifts to the beneficiaries listed.

The total tax of $294,752.61 was paid by one check of the Fidelity Title & Trust Company. Before the check was sent, the attorneys for the Pennsylvania trustees had secured from the attorneys for the California executors a written opinion that the California inheritance tax was assessed against the beneficiaries individually, and it had been agreed by these attorneys, the trustees and the beneficiaries that the Pennsylvania trustees should advance or loan the amount of the tax to the beneficiaries out of the principal of the trust and that the beneficiaries should pay the tax with the money so advanced (Ex. 4, R. 111; Ex. 5, R. 111; Ex. 8, R. 119; Ex. 9, R. 121). A written agreement dated January 15, 1926 (Ex. 6, R. 112), was executed under which the beneficiaries gave their notes to the trustees for the amounts advanced to them for the purpose of paying the California tax. These notes were for the exact amount assessed against each beneficiary by the decree of the California court.

The first and final account of the California executors (Ex. 10, R. 125-126), charged these executors with the item of $294,752.61 as advancements to the widow and other beneficiaries to pay California inheritance taxes. The supplemental account of the Pittsburgh trustees dated May 21, 1927 (Ex. 11, R. 126), listed the notes of the same beneficiaries as assets of the estate.

By requirement of the Orphans' Court of Allegheny County the agreement of January 15, 1926 (Ex. 6, R.

112) was superseded by an agreement executed under date of July 1, 1927 (Ex. 13, R. 127). This second agreement was similar in form, but shortened the period of installment payments from ten to six years and required the notes of the beneficiaries to be secured by collateral (Ex. B, Ex. C, Ex. D, R. 173).

Miriam G. Hostetter, the widow and petitioner, on October 27, 1927 repaid to the trustees in cash the full sum of $92,451.56 which had been loaned to her to pay her share of the California tax.

The item of $92,451.56 was not claimed as a deduction by the petitioner in her income tax return for the year 1926, and was not claimed as a deduction in the income tax returns filed by the executors or in the fiduciary return filed by the trustees for the year 1926, or any other year (R. 15).

The executors filed an estate tax return on which the Commissioner assessed an estate tax liability of $1,819,838.91. Against this assessment the Commissioner allowed a credit for payment of state inheritance taxes which included the item of $294,752.61, which had been paid to the State of California. (Ex. 16, R. 162; Ex. 17, R. 166; Ex. A, R. 171).

The right to this deduction was claimed by the petitioner under both clauses a (4) and a (5) of Section 703 of the Revenue Act of 1928, which are quoted in the Appendix (*infra*, pp. 29-30).

The opinion of the District Judge held that the payment of $92,451.56 for California tax had been made by the estate and not by the petitioner as beneficiary. This finding was a conclusion from documentary and other written evidence and also was based upon an interpretation of a written agreement.

The opinion did not discuss the right of the petitioner to the deduction under clause a(5), Sec. 703.

The District Judge also held that because the estate had received a credit for the $294,752.61 for California Inheritance Tax against the Federal Estate Tax, the petitioner might not be heard to assert her payment of $92,451.56, as a beneficiary, as a deduction in her personal income tax return (R. 191). The opinion stated that the credit against the Federal Estate Tax had been secured by the representation that the executors had paid this sum. As will be shown in the brief, such representation was not made and was not necessary in order to secure the credit against the Federal Estate Tax.

The Circuit Court of Appeals affirmed the decision of the District Court. Its opinion held that the petitioner was not entitled to the deduction under clause a(4) because the California tax had been paid by the estate; and that she was not entitled under clause a(5) because she had not proved that the right of the estate to claim this deduction was barred by the statute of limitations *at the time the petitioner filed her claim for refund.*

II. JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on June 27, 1940. A petition for rehearing was denied on August 9, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

III. QUESTIONS PRESENTED.

Did the Circuit Court of Appeals properly interpret retroactive subparagraphs a (4) and a (5) of the Revenue Act of 1928, in holding that—

(1)—The evidence did not show that payment of the California inheritance tax had been made by the petitioner as beneficiary within the meaning of subparagraph a (4)?

(2)—Petitioner could not recover under subparagraph a (5) because the evidence did not show that the claim of the estate to deduction was barred by the statute of limitations at the time when the petitioner filed her claim for refund?

(3)—Did the fact that the amount of the California inheritance tax was allowed as a credit against the Federal estate tax prevent the petitioner, as beneficiary, from claiming a deduction for her share of the California inheritance tax in her personal income tax return, as ruled by the District Judge and not reviewed by the Circuit Court of Appeals?

(4)—Did the Circuit Court of Appeals properly hold that there was substantial evidence to support the finding of the District Judge, that the California inheritance tax had been paid by the estate?

(5)—Did the Circuit Court of Appeals err in holding that the finding of the District Court was conclusive if supported by substantial evidence, where such finding was a conclusion drawn from documentary evidence and involved the interpretation of a written contract?

IV. REASONS RELIED ON FOR ALLOWANCE OF WRIT.

(1)—In holding that the California inheritance tax was paid by the estate and not by the beneficiary, the Circuit Court of Appeals placed a construction on subparagraph a (4) in conflict with the decisions in the class of cases in which inheritance tax was paid by the check of the fiduciary and out of the funds of the estate and yet was held to have been paid by the beneficiary, where the amount was either deducted from the share of the beneficiary in the principal of the estate or repaid to the estate by the beneficiary from his share of the net income, or otherwise.

(2)—The interpretation of subparagraph a (5) as allowing the deduction only if the estate's claim to a deduction is barred by the statute of limitations at the time when the beneficiary files her claim for refund—renders subparagraph 5 virtually useless and inapplicable. Such interpretation is contrary to the plain purpose of subparagraph a (5) as set forth in the reports of the House and Senate Committees on the passage of Section 703 (Appendix, pp. 34-35).

(3)—The ruling of the District Judge, not reviewed or corrected by the Circuit Court of Appeals, that the fact that the amount of the California tax was allowed as a credit against the Federal estate tax prevents the petitioner, as a beneficiary, from claiming a deduction for her share of the California tax, is erroneous. This interpretation of Section 703 of the Revenue Act of 1928 and of Section 301 (b) of the Revenue Act of 1924, would deny the right of a beneficiary to deduct her share of estate inheritance tax in every case where the item of estate inheritance tax was credited against the Federal estate tax; or at least in every case where the bene-

ficiary was also a fiduciary participating in obtaining such credit.

The purpose of allowing the credit against Federal estate tax was to afford some relief from double taxation on the same assets whether the inheritance tax is paid by the estate or by the beneficiary. In either case the inheritance of the beneficiary is ultimately diminished.

(4)—It has been held by the Third Circuit Court of Appeals and by other circuits that a finding which is a conclusion from undisputed or record facts may be reviewed by the appellate court, whether or not there is substantial evidence to support such conclusion.

The finding of the District Judge, approved in this case, was based upon documentary evidence and upon an interpretation of a written contract involving a question of mixed law and fact.

The approval of the finding of the District Judge is further based on the check and the written agreement without considering the other documents which show the purpose of the check and by whom the payment was ultimately made.

WHEREFORE, your petitioner prays that a writ of certiorari be issued out of this Honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that court to certify and send to this court for its review and determination, a full and complete transcript of the record and all proceedings in the case of Miriam G. Hostetter, petitioner, v. United States of America, respondent, No. 7233; and that the judgment of said Circuit Court of Appeals may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

MIRIAM G. HOSTETTER,

By J. L. Hostetter, *Attorney*.

BRIEF IN SUPPORT OF PETITION.

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court (R. 186-195) is reported in 28 Fed. Supp. 227.

The opinion of the Circuit Court of Appeals is reported in 113 Fed. (2d) 64.

ARGUMENT.

The petitioner claims to be entitled to the deduction—

> (1)—Under subparagraph a (4), on the ground that neither the estate nor she as beneficiary claimed the deduction in their returns filed for 1926, or in any other year (Petition, Par. 6th, admitted by answer, R. 15), and that she paid the California inheritance tax;
>
> or
>
> (2)—Under subparagraph a (5), on the ground that a claim for the deduction by the estate is barred by the statute of limitations, and she is entitled to the deduction whether she paid the tax or the estate paid it.

I.

PETITIONER PAID THE CALIFORNIA INHERITANCE TAX AND IS ENTITLED TO RECOVER UNDER SUBPARAGRAPH A (4) OF SECTION 703 OF THE REVENUE LAW OF 1928.

Paragraph Sixth of the petition, admitted by the answer (R. 15) avers that—

> "The said item of $92,451.56 was not claimed as a deduction against gross income in the income tax return which was filed by the Executors under the last will and testament of D. Herbert Hostetter, Deceased, for the calendar year 1926, or in the fidu-

ciary return which was filed for the calendar year 1926 by the Trustees under the last will and testament of D. Herbert Hostetter, Deceased, and was not claimed as a deduction by the petitioner in the income tax return filed by her for the year 1926, or in any other year or years."

This admission by the answer established conclusively that no deduction has been claimed by the estate or by the beneficiary in 1926, or in any other year.

The only other requirement under subparagraph (4) is that the petitioner be the person by whom the California tax was paid.

The opinion of the Circuit Court of Appeals holds that:

(1)—The California inheritance tax is imposed "upon the right to inherit rather than the right to transit".[1]

(2)—In the report of the California state inheritance tax appraiser, the order of the probate court approving the appraisal, and the tax receipt issued by the treasurer of Los Angeles County, "the tax is treated as being due by the beneficiaries."

(3)—The provisions in the California act that the executors shall deduct the tax before paying the shares to the beneficiaries, etc., are "obviously designed for the effective collection of the tax rather than to fix the liability for the tax upon the estate".

From these rulings, we submit, it follows that the California tax was owed by the beneficiaries, and not by the estate.

While so ruling, the opinion adds that it does not necessarily follow from the fact that the petitioner as

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1. So held in *United States v. Kombst,* 286 U. S. 424; *Estate of Miller,* 184 Cal. 674; *Estate of Watkinson,* 191 Cal. 591; *Estate of Rath,* 10 Cal. (2d) 399.

beneficiary was ultimately liable for the California inheritance tax, that the petitioner in fact paid the tax in 1926.

We submit, however, that the presumption would be that the payment was made by the party ultimately liable.

The ruling of the Circuit Court of Appeals, we submit, is contrary to many decisions in which a state inheritance tax was imposed upon the beneficiary but was paid by the executor out of the estate and later the executor either deducted the amount of the tax from the share of the beneficiary or was reimbursed by the beneficiary for the payment. In these cases, it has been held that the tax was in fact paid by the beneficiary and he was entitled to deduct the same in his income tax return.

Our case is even clearer, because, as we shall show in detail hereafter, the trustees of the estate made a loan to the beneficiary and with this money the beneficiary paid the tax.

In this case, the Circuit Court of Appeals said:

> "The District Court found from the documentary evidence that the estate in fact paid the tax. We do not believe this finding was erroneous." *As we read the agreement* of January 15, 1926, it provided that the tax be paid with funds advanced for that purpose by the Pennsylvania executors and trustees of the estate. It is true that the executors safeguarded the estate from loss and themselves from surcharge by requiring that the life tenants release their respective interests in income equal to the taxes and execute non-negotiable promissory notes payable in installments over a period of ten years. The emphasis throughout the agreement,

however, is that the executors should pay the tax. We think it may fairly *be concluded* that the petitioner did not borrow the money and then use the borrowed funds to pay the taxes, but that the executors paid the taxes and the petitioner promised to reimburse them."

It clearly appears, therefore, that—

(a)—The conclusion of the Appellate Court was based upon the interpretation of the agreement under which moneys were "advanced" by the Trustees, and—

(b)—The finding is merely a conclusion from documentary evidence and is a legal interpretation of a written instrument, presenting a mixed question of law and fact.

A FINDING WHICH IS NOT BASED UPON DISPUTED TESTIMONY BUT IS AN INFERENCE OR CONCLUSION FROM WRITTEN RECORDS OR UNDISPUTED FACTS MAY BE REVIEWED BY AN APPELLATE COURT.

Greenfield v. Blumenthal, 69 Fed. (2d) 294, 298 (Certiorari denied in 292 U. S. 633);

In re Heilbron Bros., Inc., 226 Fed. 803, 804 (Affirmed by Circuit Court of Appeals in 229 Fed. 554);

Budd v. Commissioner of Internal Revenue, 43 Fed. (2d) 509, 512;

Washburn v. Commissioner of Internal Revenue, 51 Fed. (2d) 949, 951;

Bianchi v. Vere, 17 Fed. (2d) 22 (Certiorari denied in 274 U. S. 752);

Quinn v. Union National Bank, 32 Fed. (2d) 762.

Again, the opinion of the Circuit Court of Appeals says:

> "Without more, the fact that the entire tax assessed upon the value of the property in California was paid by one check, drawn by the Fidelity Title and Trust Company, an executor and trustee under the will, upon funds belonging to the corpus of the estate would justify the District Court's *conclusion* that the estate and not the beneficiaries paid the tax."

This statement, we submit, amounts to saying that the District Court might pick out this check, which was one of a number of documents comprising the entire transaction and entirely ignore the other documents which provided for the issuing of the check and declared the purpose for which it was issued. The requirement of substantial evidence to support a finding is not met by isolating one paper from other papers which show what was to be paid by the check and who was to pay.

As already stated, the presumption is that the payment was made by the party ultimately liable.

What evidence was there to rebut such presumption? The opinion relies upon (a) the check by which the tax was paid; and (b) the agreement of January 15, 1926.

The Check: The check was signed by the Fidelity Title and Trust Company merely, without any designation as executor or otherwise. This fact shows that the trust company was merely transmitting the money and was not acting in a fiduciary capacity.

The reverse side of the check bears the words "Fidelity Title and Trust Company, co-executor". This notation earmarks the deposit account against which the check is authorized to be charged.

The reverse side of the check further states that the check is:

> "in full for inheritance taxes—estate D. H. Hostetter, Decd. as shown per first and final account filed by Miriam G. Hostetter and Helene Hostetter, executrices" (R. 118).

This first and final account was offered in evidence as Exhibit 10, and stated that the executors had received

> "Advancements by beneficiaries under Last Will and Testament of D. Herbert Hostetter, deceased, to pay California State Inheritance Taxes 294,752.61" (R. 126).

This reference in the check to the account shows that the money came from the beneficiaries who borrowed it from the Pennsylvania trustees.

Our case, we submit, is stronger than several other classes of cases in which the inheritance tax was paid by the check of a fiduciary and out of the funds of the estate, and yet the tax was held to have been paid by the beneficiaries. In one class of cases, the amount of payment was deducted from the share of the beneficiary in the estate. In fact, this is done uniformly under a state statute which requires the executor to act as a collection agent and to see that the tax is paid to the state. In another class of cases, the trustees have filed a fiduciary return showing the payment of inheritance tax as a credit against the share of the beneficiary.

In each of these classes of decisions, the fiduciary pays the inheritance tax with his check as executor of

the estate and the check is paid out of the funds of the estate, and yet with no other explanation, the payment is held to be made by the beneficiary. The fact that the state law imposes a tax upon the beneficiary helps to support the conclusion.

Our case is stronger because the check is connected with and explained by other written instruments:

(a)—Before the check was sent, correspondence passed between the Pittsburgh attorneys and the California attorneys of this estate, and the California attorneys advised that the inheritance tax of that state was assessed against the beneficiaries under the will, but that it might be paid in the first instance by the executors, but must then be charged against the beneficiaries in the final account (Exs. 4 and 5, R. 111). This was the procedure in the classes of decisions just mentioned. The Pittsburgh attorneys then submitted in a letter (Ex. 8, R. 119), the procedure exactly as later carried out; the Pennsylvania trustees to loan the money to the beneficiaries and the beneficiaries to give their notes to the trustees for their respective shares of the tax. This loan was made necessary by the fact that the beneficiaries did not have the money (R. 66). The California attorneys advised their approval and that "the disbursements will actually be made in the last analysis by the beneficiaries themselves * * *" (Ex. 9, R. 121).

(b)—The receipt in which, the opinion of the Circuit Court of Appeals says, "the tax is treated as being due by the beneficiaries" (Ex. 2, R. 95).

(c)—First and final account filed by the California executors charged the executors with "advancements *by beneficiaries* * * * to pay California inheritance taxes 294,752.61". (Ex. 10, R. 126). In contrast with this the account charged the

executors with *advancements by the Fidelity Title and Trust Company* to pay expenses of administration. This difference shows unmistakably that the payment of the California tax was made by the beneficiaries and not by the estate.

(d)—Supplemental account filed by the Pittsburgh trustees listed the notes given by the beneficiaries as assets of the estate (Ex. 11, R. 126).

This listing of the notes as assets shows that they were treated by the Pennsylvania trustees as investments—that loans had been made by the trustees to the beneficiaries; and that these notes were not merely in the nature of indemnity given by the beneficiaries to the Pennsylvania trustees.

The Agreement of January 15, 1926: It recited that the California inheritance tax was charged against the various legatees and provided that a sum equal to the amount of the tax should be advanced by the Pennsylvania executors to the Pennsylvania trustees, and the trustees should then advance that sum to the California executors to pay the tax and further that the beneficiaries should then give their notes to the trustees for their respective share of the tax.

The trust company refused to forward the check to California unless this agreement was signed by the beneficiaries (R. 43).

In all this we find nothing except that the tax was advanced and paid by the fiduciary out of the funds of the estate, just as in the classes of decisions above mentioned.

In our case we do have a further and very distinctive provision:

The agreement required each beneficiary to give his note to the fiduciary for his share of the tax and provided that the notes should be paid by periodical deductions from the share of each beneficiary in the income.

This agreement and the notes, we submit, show that the beneficiaries were paying the tax. Otherwise, why would they sign such notes and obligate themselves to pay these large sums of money? The opinion suggests that in taking these notes, the executors safeguarded the estate from loss and themselves from surcharge. However, if such was the purpose, the agreement would have provided that the beneficiaries pay only in case of such loss, and in the absence of loss, the beneficiary would never have paid anything. Here, however, the beneficiaries bound themselves to pay periodically, loss or no loss, and actually did pay the full amounts of the notes.

Finally, we submit, that neither the check nor the agreement should be considered as evidence in itself, but each is inseparably connected with the other documents just summarized and is explained by them. These documents form one transaction and from them as a whole, the conclusion must be drawn as to who paid the California tax. Such a conclusion, we submit, does fall within the rule that an inference drawn from documentary evidence or uncontroverted facts may be reviewed whether supported by substantial evidence or not.

The Orphans' Court of Allegheny County, Pennsylvania, having jurisdiction over the estate of D. Herbert Hostetter, Deceased, reviewed the same documentary evidence and held that the California inheritance tax had been assessed against the beneficiaries and had been paid by the beneficiaries with funds which were loaned to them by the estate.

In 1931 the executors of Frederick G. Hostetter, a son, filed a petition in the Orphans' Court of Allegheny County for a review of its decree of distribution of the estate of D. Herbert Hostetter. This petition (Ex. 14, R. 135) averred that the California tax was assessed against the interest of the life beneficiaries (Pars. 8, 9); that Frederick had given his note to the trustees for his share of the tax and the note had been partly paid by moneys withheld from his share of the income (Pars. 20, 19, 24); and that the life beneficiaries were not legally liable for the inheritance tax and that the tax was payable out of corpus without reimbursement from beneficiaries (Par. 22).

The petition prayed for a decree cancelling the note of Frederick given for his share of the tax and directing the trustees to refund to his estate the amounts retained from his share of income and applied on the note (R. 148). The Orphans' Court held that the California tax had been assessed against the beneficiaries and paid by them with funds loaned to them by the estate and refused reimbursement (Opinion, Ex. 15, R. 150).

II.

THE PETITIONER IS ENTITLED TO THE DEDUCTION UNDER SUBPARAGRAPH A (5).

The ruling of the Circuit Court of Appeals in regard to the subparagraph a (5) is contained in the following quotation from the opinion:

> "Clause (5) gives no comfort to the petitioner for there is nothing in the record other than an allegation in her complaint, which is denied in the answer, that at the time the petitioner filed her claim for refund the statute of limitations had run so as to bar the estate's claim to a deduction for the taxes which it had paid."

The petitioner respectfully suggests that the averment that any claim of the estate to the deduction was barred by the statute of limitations, was a legal conclusion. However, Paragraph Sixth of the petition (R. 3), admitted by the government's answer (R. 7), averred (omitting unnecessary words):

> "The said item of $92,451.56 was not claimed as a deduction against gross income in the income tax return which was filed by the Executors * * *, for the calendar year 1926, or in the fiduciary return which was filed for the calendar year 1926 by the Trustees * * *, or in any other year or years." (R. 3).

The words "in any other year or years", inserted at the end of Paragraph Sixth, are preceded by a comma, so that these words qualify the entire preceding portion of the sentence, including the allegation that

> "the said item of $92,451.56 was not claimed as a deduction."

The allegation, therefore, is that the said item of $92,451.56 was not claimed as a deduction by the executors or trustees in any other year or years.

The averment that the item was not claimed as a deduction in the income tax return *for* the year 1926 is in contrast with the words at the end "*in* any other year or years". This comparison shows that Paragraph Sixth is intended to say that no claim for a deduction was made in any year or years,—at all or in any manner, and not merely in a return.

The affidavit to the petition was made by the petitioner on January 18, 1934, (R. 8), and is therefore an averment, admitted, that prior to that date the item was not claimed as a deduction by the estate.

The statute of limitations applicable to this case is Sec. 322 (b) (1), which has been embodied in identical language in the revenue laws of 1934, 1936, 1938 and 1940, as follows:

> "(1) Period of Limitation.—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later * * *."

The government's tenth request and the lower court's tenth finding, which are identical, are as follows:

> "10. Although the executors and trustees filed income tax returns for 1926, neither they nor plaintiff claimed the benefit of a deduction with respect to said $294,752.61 inheritance tax payment, or any part thereof, in their said returns." (R. 190)

Petitioner's claim for refund was rejected by the Commissioner of Internal Revenue on January 22, 1932, and her suit was filed on January 20, 1934. (4th Finding, R. 187). The averment admitted of Paragraph Sixth is therefore that no claim for deduction was made by the estate prior to January 18, 1934.

The period of three years from the date of filing the returns of the executor and trustee had elapsed before either of these dates.

Therefore, "the claim of the deduction by the estate is barred by the statute of limitations" within the language of subparagraph a (5).

The petitioner, Miriam G. Hostetter, filed on March 12, 1930 (3rd Find., R. 187), a claim for refund, asserting her right to this deduction in her income tax for 1926. This claim was rejected by the Commissioner on January 22, 1932, and this suit was instituted on January 20, 1934 (4th Find., R. 187). Therefore, the "claim by the beneficiary is not so barred" within subparagraph a (5).

Both conditions of subparagraph a (5) are therefore satisfied.

The last paragraph of the opinion, quoted above, objects specifically that the record does not show that, *"at the time the petitioner filed her claim for refund* the statute of limitations had run so as to bar the estate's claim to a deduction * * *." (Italics ours).

This interpretation of subparagraph (5), that the right of the beneficiary to the deduction must depend upon whether the right of the estate to the deduction is barred when the beneficiary's claim for refund is filed, we respectfully submit, is unsound, because—

(a)—***This interpretation would render subparagraph (5) virtually inapplicable, or useless.*** The returns of both the beneficiary and of the executor and trustee must be filed before the same date, March 15th, and the taxes must be paid by either before that date or quarterly. The dates are the same in each case and the period therefore within which the beneficiary may claim the deduction and the period within which the executor or trustee may claim the deduction, coincide. By the time the period for the estate to claim the deduction has expired, the period for the beneficiary to claim the deduction has also ended and the right of the beneficiary to claim is also barred.

In like manner the estate could not file a claim for the deduction under subparagraph a (5) until after the right of the beneficiary to claim the deduction has expired and the right of the estate also would be barred.

(b)—The result would be that in virtually no case could the beneficiary claim the deduction under subparagraph (5) in spite of the fact that the report of the conference committee of both houses on subparagraph (5) specifically says that subparagraph (5) was added by Senate amendment No. 210 to the Revenue Law of 1928 because—

> "* * * in order to *make it certain that the deduction will be allowed either to the estate or to the beneficiary in any event,* the Senate amendment allows the deduction to the estate if the beneficiary is barred from filing a claim for refund by the statute of limitations, and vice versa * * *" (Italics ours).

This report is quoted in the Appendix, *infra.* p. 35.

(c)—The context of Section 703 (a) itself and the committee reports show that the intention of

Congress was to enact remedial legislation of the most liberal character. This has been expressed in general counsel's memorandum 9490 (Cumulative Bulletin X-1, 208, 210), as follows:

"It is evident, both from the context of section 703, itself, and from the committee reports, that the intention of Congress was to enact remedial legislation of the most liberal character—legislation which would tend to do away with administrative difficulties in determining the precise character of the taxes in question, and which would eliminate litigation, or greatly reduce it, with respect thereto. In the language of the committee reports, the general plan for effecting this result was 'to make it certain that the deduction will be allowed either to the estate or to the beneficiary in any event' (subject to the statute of limitations), by prescribing rules which would tend 'to ratify what the taxpayers have done.' It is a familiar canon of statutory construction that remedial legislation of this character should be liberally construed."

The same opinion was expressed by the Board of Tax Appeals in *Marion S. B. Lansill,* 17 B. T. A. 413; and in *Frances E. B. Lentz,* 21 B. T. A. 1336, 1342.

(d)—The time when the claim of the estate to the deduction must be barred, we submit, is when the question of the right of the beneficiary to the deduction is to be *determined.* This determination will ordinarily be made, or could be deferred until, after the period of limitation has expired for both the beneficiary and the estate.

The grant of authority made in Sec. 703 to allow the deduction is contained in the initial words "In determining the net income of an heir * * * beneficiary * * * the amount of the estate * * * taxes * * * shall be allowed as the deduction

> * * * if the claim of the deduction by the estate is barred by the statute of limitations, * * *."

The key words of Section 703 are "In determining". In our case, we submit, the determining occurred when the lower court made its decision.

Prior to the enactment of Sec. 703, the right to claim the deduction depended upon the interpretation of the state inheritance tax law; if the state tax was imposed on the right to transmit, the deduction could only be claimed by the estate, if the state tax was imposed upon the right to inherit, the deduction could only be claimed by the beneficiary. One of the purposes of Sec. 703 was to save deductions where the payment or the claim to the deduction had been made by the wrong party, and the period for the right party to claim the deduction had expired. The wrong party was the party—whether the beneficiary or the estate—upon whom the state statute did not impose the tax.

Thus in the report of the House Committee on Ways and Means, in regard to this section, it was said:

> "* * * As a result of recent Supreme Court decisions (Keith v. Johnson and United States v. Mitchell), redeterminations of the deductions claimed by the estate or by the beneficiary will be necessary unless the situation is remedied by retroactive legislation. Consequently your committee deems it advisable to insert section 705 in the bill, the general effect of which will be to ratify what the taxpayers have done and to prescribe specific rules for future action." (Quoted on Page 42 of original brief and published in Cong. Doct. 8831).

Section 703 contemplates that the determination may be made after the right of the beneficiary or the

right of the estate is barred by limitations and hence subparagraph (5) was inserted to cover this very situation.

III.

THE DISTRICT COURT ERRED IN HOLDING THAT THE FACT THAT THE AMOUNT OF THE CALIFORNIA INHERITANCE TAX WAS ALLOWED AS A CREDIT AGAINST THE FEDERAL ESTATE TAX WOULD PREVENT THE PETITIONER FROM CLAIMING A DEDUCTION FOR HER SHARE OF THE CALIFORNIA INHERITANCE TAX IN HER PERSONAL INCOME TAX RETURN.

The opinion of the Court of Appeals did not discuss this question, and the effect is to leave unchallenged the ruling of the District Court on this question of the interpretation of the Revenue Act.

In the Third Conclusion of Law, the District Judge rules:

> "The estate having had the benefit of a credit for the entire $294,752.61 inheritance tax in the Federal estate tax return as the result of representations to the Commissioner, by plaintiff and her co-executors, that the executors had paid the same, plaintiff in equity and good conscience may not now be heard to assert that she paid $92,451.56 thereof in her individual capacity."

In answer to this conclusion, we respectfully submit:

(a)—The record contains no evidence that any representation was made by the petitioner or her co-executors to the Commissioner, that the executors had paid the California inheritance tax of $294,752.61.

(b)—The estate was entitled to a credit for the amount of the California inheritance tax as against

the amount of the Federal estate tax, whether the California inheritance tax was paid by the estate or was paid by the beneficiaries.

The representation, even if made, would be wholly immaterial.

In other words, the law gave two separate and independent rights:

(1)—The right to the estate to credit against the Federal Estate Tax, 25% of the amount of any estate, inheritance, legacy or succession taxes paid to a state by the estate or by the beneficiaries.

(2)—The right to the beneficiary, under Section 703, to deduct his share of such inheritance tax from his gross income in the year in which that tax was paid.

The first is the right to a credit against tax and the second is the right of deduction from gross income.

Section 301 (b) of the Revenue Act of 1924, Title III, Part I, provides:

> "The tax imposed by this section shall be credited with the amount of any estate, inheritance, legacy or succession taxes actually paid to any State or Territory or the District of Columbia, in respect of any property included in the gross estate. The credit allowed by this subdivision shall not exceed 25 per centum of the tax imposed by this section."

It will be noted that the language used is "taxes actually paid to any state * * * in respect of any property included in the gross estate".

The only requirement is that the state tax shall have been paid in respect of property included in the gross estate.

The statute does not say by whom it needs to be paid.

An inheritance tax is upon the right of a beneficiary to inherit. A legacy tax is upon the legatee. A succession tax is upon the right of the beneficiary to succeed.

The retroactive Section 703 of the Revenue Act of 1928 specifically regulated the right to deduct state inheritance taxes in the income tax returns of the estate and of the beneficiary. Subject to the conditions in Section 703, the right might be claimed by the estate or by the beneficiary.

The right to a credit against the Federal Estate Tax for state inheritance taxes paid by a beneficiary was expressly recognized by the Estate Tax Regulations. Article 9 (a) of Regulations 70 (1926 edition) provided that—

> "Before the Commissioner allows any credit for any estate, inheritance, legacy, or succession taxes, there must be submitted to him the following: (3) An affidavit of the executor stating whether any litigation has been instituted, or appeal taken, or any such action is designed or contemplated by him, or, to his knowledge, *by any beneficiary* or other person, the final determination of which may affect the amount of such taxes."

A similar provision was made in Article 9 (a) of Regulations 68 (1924 edition).

Respectfully submitted,

H. F. Stambaugh,
Attorney for Petitioner.

APPENDIX.

Revenue Act of 1928,

"Sec. 703. Deduction of Estate and Inheritance Taxes—Retroactive.

(a) In determining the net income of an heir, devisee, legatee, distributee, or beneficiary (hereinafter in this section referred to as 'beneficiary') or of an estate for any taxable year, under the Revenue Act of 1926 or any prior revenue Act, the amount of estate, inheritance, legacy, or succession taxes paid or accrued within such taxable year shall be allowed as a deduction as follows:

(1) If the deduction has been claimed by the estate, but not by the beneficiary, it shall be allowed to the estate;

(2) If the deduction has been claimed by the beneficiary, but not by the estate, it shall be allowed to the beneficiary;

(3) If the deduction has been claimed by the estate and also by the beneficiary, it shall be allowed to the estate (and not to the beneficiary) if the tax was actually paid by the legal representative of the estate to the taxing authorities of the jurisdiction imposing the tax; and it shall be allowed to the beneficiary (and not to the estate) if the tax was actually paid by the beneficiary to such taxing authorities;

(4) If the deduction has not been claimed by the estate nor by the beneficiary, it shall be allowed as a deduction only to the person (either the estate or the beneficiary) by whom the tax was paid to such taxing authorities, and only if a claim for refund or credit is filed within the period of limitation properly applicable thereto;

(5) Notwithstanding the provisions of paragraphs (1), (2), (3), and (4) of this subsection,

if the claim of the deduction by the estate is barred by the statute of limitations, but such claim by the beneficiary is not so barred, the deduction shall be allowed to the beneficiary, and if such claim by the beneficiary is barred by the statute of limitations, but such claim by the estate is not so barred, the deduction shall be allowed to the estate.

(b) As used in this section, the term 'claimed' means claimed—

(1) In the return; or

(2) In a claim in abatement filed in respect of an assessment made on or before June 2, 1924."

EXCERPTS FROM CALIFORNIA INHERITANCE TAX LAW.

General Laws of California of 1923, Part 2, Page 3502, Article 8443:

"Sec. 1. Title. (1) This act shall be known as the 'inheritance tax act.'

* * * *

"Sec. 4. Tax when property value not over twenty-five thousand dollars. When the property or any beneficial interest therein so passed or transferred exceeds in value the exemption hereinafter specified and shall not exceed in value twenty-five thousand dollars, the tax hereby imposed shall be:

"(1) Where the person or persons entitled to any beneficial interest in such property shall be the husband, wife, lineal ancestor, lineal issue of the decedent or any child adopted as such in conformity with the laws of this state, or any child to whom such decedent for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent (provided, however, such relationship began at or before the child's fifteenth birthday, and was continuous for said ten years thereafter), or any lineal issue of such adopted or mutu-

ally acknowledged child, at the rate of one per centum of the clear value of such interest in such property.

* * * *

"Sec. 5. Tax when property value exceeds twenty-five thousand dollars. (1) When the market value of such property or interest passed or transferred to any of the persons mentioned in subdivision one of section four exceeds twenty-five thousand dollars, the rates of tax upon such excess shall be as follows:

"Rates of tax on property or interest transferred. (a) Upon all in excess of twenty-five thousand dollars and up to fifty thousand dollars, two per centum of such excess.

* * * *

"Sec. 7. (1) Time of payment. Interest. Discount. Bond. All taxes imposed by this act, unless otherwise herein provided for shall be due and payable at the death of the decedent, and if the same are paid within eighteen months, no interest shall be charged and collected thereon, but if not so paid, interest at the rate of ten per centum per annum shall be charged and collected from the time said tax accrued; provided, that if said tax is paid within six months from the accruing thereof a discount of five per centum shall be allowed and deducted from said tax. And in all cases where the executors, administrators, or trustees do not pay such tax within eighteen months from the death of the decedent, they shall be required to give a bond for the payment of said tax, together with interest.

* * * *

"Sec. 8. (3) Property transferred in trust. When property is transferred in trust or otherwise, and the rights, interests or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended, or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the

said contingencies or conditions, would be possible under the provisions of this act, and such tax so imposed shall be due and payable forthwith by the executors or trustees out of the property transferred; provided, however, that on the happening of any contingency whereby the said property, or any part thereof, is transferred to a person or corporation exempt from taxation under the provisions of this act, or to any person taxable at a rate less than the rate imposed and paid, such person or corporation shall be entitled to a return of so much of the tax imposed and paid as the difference between the amount paid and the amount which said person or corporation should pay under the provisions of this act; such return of overpayment shall be made in the manner provided by section eleven of this act, upon order of the court having jurisdiction; provided, that the person or persons or body politic or corporate beneficially interested in the property chargeable with said tax or the trustees thereof may elect not to pay the same until such person or persons, or body politic or corporate beneficially interested in such property shall come into the actual possession or enjoyment thereof, and in that case such person or persons or body politic or corporate or trustees shall execute a bond to the people of the state of California in a penalty of twice the amount of said tax with such sureties as the said superior court may approve, conditioned for the payment of said tax and interest thereon at the rate of seven per cent per annum commencing at the expiration of eighteen months from the death of the decedent at such time or period as they or their representatives may come into the actual possession or enjoyment of such property, * * *.

"(4) Estates in expectancy. Estates in expectancy which are contingent or defeasible and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance, shall be appraised at their full, undiminished

value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estates for purposes of taxation, upon which said estates in expectancy may have been limited.

* * * *

"Sec. 9. (1) Collection of tax by administrator, etc. Any administrator, executor, or trustee having in charge or trust any legacy or property for distribution, subject to the said tax, shall deduct the tax therefrom, or if the legacy or property be not money he shall collect the tax thereon, upon the market value thereof, from the legatee or person entitled to such property, and he shall not deliver, or be compelled to deliver, any specific legacy or property subject to tax to any person until he shall have collected the tax thereon; and whenever any such legacy shall be charged upon or payable out of real estate, the executor, administrator, or trustee shall collect said tax from the distributee thereof, and the same shall remain a charge on such real estate until paid; if, however, such legacy be given in money to any person for a limited period, the executor, administrator, or trustee shall retain the tax upon the whole amount; but if it be not in money he shall make application to the superior court to make an apportionment, if the case require it, of the sum to be paid into his hands by such legatees, and for such further order relative thereto as the case may require."

REPORTS OF THE HOUSE AND SENATE COMMITTEES ON SECTION 703 OF THE REVENUE ACT OF 1928.

The proceedings in committee are quoted in the opinion of Mr. Sternhagen in *Lansill v. Commissioner,* 17 B. T. A., 413, 426, as follows:

> "As the provision was originally introduced in the House bill it contained no such matter as that

of subsection (a) (5) and subsection (b). It provided only for deductions 'claimed in the return'. The report of the House Committee on Ways and Means in respect of this section was as follows:

"Sec. 703. Deduction of Estate and Inheritance Taxes—Retroactive.

"Section 214 (a) (3) of the Revenue Act of 1926 and corresponding provisions of prior revenue Acts permit a deduction, from gross income in computing the net income subject to tax, for taxes paid or accrued during the taxable year. Obviously this provision applies only to taxes imposed upon the taxpayer, and does not permit the deduction of taxes paid by a volunteer. Extraordinary difficulty has been encountered in applying this deduction in the case of estate, inheritance, legacy, and succession taxes, imposed by a State, Territory, or a foreign country. These taxes are usually paid by the executor of the estate. Under the regulations of the department the deduction was allowed the estate, in computing its income tax, if the tax was considered as an estate tax, and was allowed as a deduction to the beneficiary if the tax was considered to be an inheritance, legacy, or succession tax. As a result of recent Supreme Court decisions (Keith v. Johnson, and United States v. Mitchell), redeterminations of the deductions claimed by the estate by the beneficiary will be necessary unless the situation is remedied by retroactive legislation. Consequently your committee deems it advisable to insert section 705 in the bill, the general effect of which will be to ratify what the taxpayers have done and to prescribe specific rules for future action.

"The Senate on the floor struck out the requirement that the only cognizable claim for the deduction should be that made in the return and inserted (b) instead. It also added (a) (5). Thereafter the

report of the Conference Committee of both Houses contained the following:

"Amendment No. 210: The House bill contained retroactive provisions removing the uncertainty of the present law as to the deductibility, in computing net income, of amounts paid as estate, inheritance, succession, or legacy taxes, and validated the deductions claimed in the return of the taxpayer, and provided for the case where the deduction was claimed by both the estate and the beneficiary and the case where neither claimed it. The Senate amendment adopts the provisions of the House bill and extends them to cases where the deduction was claimed by a claim in abatement, and in order to make it certain that the deduction will be allowed either to the estate or to the beneficiary in any event, the Senate amendment allows the deduction to the estate if the beneficiary is barred from filing a claim for refund by the statute of limitations, and vice versa. This provision does not permit the filing of a claim for refund, however, if the period of limitation has expired; and the House recedes.

"The bill was thereupon enacted containing the language as above quoted." (426-427)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

NO. 563

MIRIAM G. HOSTETTER, Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

REPLY BRIEF FOR PETITIONER.

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Subparagraph (4).

Respondent's brief correctly states that "The District Court found from the evidence that the amount claimed as a deduction in this proceeding was not paid by her *within the taxable year*" (R. 190). (Italics ours.)

The opinion of the Circuit Court of Appeals is inaccurate in saying that "The District Court found from the documentary evidence that the estate in fact paid the tax" (R. 202). The District Court made no such finding.

Petitioner has never contended that the mere giving of a note in 1926 entitled her to a deduction in that year. Her contention is that the California inheritance tax was imposed by law upon, and was assessed against,

her right to inherit, as the Circuit Court of Appeals held (Pet. Brief, p. 11); that the Fidelity Title and Trust Company, as executor, loaned her the money with which to pay the tax; that she gave her note for the amount to the trust company and signed an agreement to reimburse the trust company, before the trust company forwarded the money by its check to California to pay the tax, and that by this method she, herself, and not the executor, made the payment.

All this occurred during 1926. If she had negotiated a loan from the banking department of the trust company and used the proceeds of the note to pay the California tax, no one would contend that the tax was not paid until the note was paid.

Petitioner's argument on this point is set forth on pages 14 to 19 of the brief.

Respondent's brief cites *Helvering v. Price,* 309 U. S. 409, which merely held that the amount of a note could not be deducted as a loss until the note was paid.

The excerpts quoted above from the finding of the District Court and the opinion of the Circuit Court of Appeals in our case show clearly that the finding was a mere conclusion based upon written documents and the interpretation of the same.

In *Helvering v. Price,* 309 U. S. 409, this court held that the finding of the Board of Tax Appeals was reviewable by the Circuit Court of Appeals and that the latter's decision was reviewable in this court, saying:

> "Respondent insists initially that the transaction in 1932 was considered by the parties as constituting a payment of respondent's liability under the guaranty, and that this payment is a fact found by the Board of Tax appeals and is not open to re-

view. But the findings of the Board disclose the entire transaction, and its legal effect in the application of Sec. 23 (e) of the Revenue Act of 1932, as to the deduction of losses sustained during the taxable year, was reviewable by the Circuit Court of Appeals. Its decision on that point is reviewable here." (412).

Subparagraph (5).

The contention that the record does not show that the claim of the estate was barred, is discussed in Petitioner's Brief, pages 20 to 22.

What the Circuit Court of Appeals held, was that the record did not show that— "*at the time the petitioner filed her claim* for refund the statute of limitations had run so as to bar the estate's claim to a deduction" (R. 202-203). (Italics ours.)

In petitioner's brief (pp. 22-25) it is argued that this construction—that the right of the estate to the deduction must be barred by the Statute of Limitations at the time when the beneficiary's claim is filed—renders subparagraph (5) virtually inapplicable and useless.

Respectfully submitted,

H. F. Stambaugh,
Attorney for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 563

MIRIAM G. HOSTETTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the District Court of the United States for the Western District of Pennsylvania (R. 186–195) is reported at 28 F. Supp. 227. The opinion of the Circuit Court of Appeals for the Third Circuit (R. 199–203) is reported at 113 F. (2d) 64.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 27, 1940 (R. 203). A petition for rehearing was denied by the Circuit Court of Appeals on August 9, 1940 (R. 204). The petition

for a writ of certiorari was filed on November 9, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the taxpayer is entitled to deduct from her gross income for 1926, the amount of $92,451.56 alleged to have been paid during the year to the State of California as inheritance taxes upon the estate of her deceased husband.

STATUTES INVOLVED

The pertinent provisions of the statutes involved are printed in the Appendix, *infra,* pp. 10–13.

STATEMENT

This suit was brought against the United States to recover an alleged overpayment of federal income tax for the year 1926 in the amount of $22,912.54 (R. 2–6). The cause was submitted to the trial court upon the allegations and admissions in the pleadings (R. 2–10, 14–18), the oral testimony of one witness (R. 34–76), and certain documentary evidence (R. 78–179), from which the court made Findings of Fact and Conclusions of Law (R. 186–192), supplemented by a written opinion (R. 192–195), and entered judgment for the United States (R. 195). The Circuit Court of Appeals affirmed (R. 199–203).

The findings of the District Court may be summarized as follows:

Miriam G. Hostetter, the petitioner, is the widow of D. Herbert Hostetter who died testate, a resident of Pittsburgh, Pennsylvania, on September 28, 1924. In addition to the petitioner, the decedent left surviving him two sons, two daughters, and four grandchildren (R. 186–187).

By the decedent's will the petitioner, one daughter, and the Fidelity Title & Trust Company of Pittsburgh were nominated and promptly qualified as executors (R. 187).

The decedent's estate consisted of real and personal property located in divers states, and included a net estate in California of a fair market value of \$3,636,701.58 (R. 87, 89–91, 187–188).

The decedent left specific property to petitioner. The residue was left in trust, the net income to be distributed in monthly installments, one-half to the petitioner for life and after her death to decedent's children or their lineal descendants, and the other half to the decedent's children and their descendants, with specified remainders (R. 78–85, 188–190).

On or about February 10, 1926, the decedent's executors paid \$294,752.61 out of the corpus of his estate to the State of California as inheritance tax (R. 190).

On March 14, 1927, the petitioner filed her individual federal income-tax return for the year 1926 and paid the tax of \$32,599.77 shown thereon to be due. The return was made upon the cash receipts and disbursements basis (R. 186). On March 12,

1930, she filed a claim for refund of $22,912.54 of the tax paid for 1926. The basis of her claim was that she had paid to the State of California on February 10, 1926, the amount of $92,451.56, which represented the proportionate amount of the total inheritance tax paid to the State of California applicable to her life estate in the property left by the decedent in that State (R. 186, 190).

The District Court found as a fact that the taxpayer did not pay the amount of $92,451.56, or any other amount, to the taxing authorities of California during the taxable year 1926 (R. 190). However, she did give the executors her non-interest-bearing note in that amount, payable in ten annual installments. She in fact paid the note in full in 1927 (R. 190). The executors were allowed to credit all the California inheritance taxes against the Federal estate tax, but neither they nor petitioner claimed the benefit of a deduction with respect to these inheritance taxes or any part thereof, in their income-tax returns for the year 1926 (R. 190).

The District Court further found as a fact that under the decedent's will the petitioner's only interest in the decedent's California estate, aside from compensation as coexecutor and cotrustee, was the right to receive for life one-half of the net income accruing thereon subsequent to September 28, 1924, after payment of "all taxes and necessary expenses" (R. 190).

On the basis of the facts found the District Court concluded as a matter of law that the petitioner was not entitled to a deduction of $92,451.56, or any other sum, from her 1926 income as inheritance taxes *paid by her* during that year, and that the taxes sought to be recovered in this action had been lawfully assessed and collected (R. 191, 192). The Circuit Court of Appeals affirmed (R. 199–203).

ARGUMENT

The decision of the Circuit Court of Appeals is correct and is not in conflict with any decision of this Court or any other Circuit Court of Appeals. No question of general importance is here presented.

This suit was brought to recover federal income taxes paid by the petitioner for the taxable year 1926. The basis of the suit is the petitioner's claim that she is entitled to a deduction from income of that year in the amount of $92,451.56, under Section 703 of the Revenue Act of 1928, *infra,* which applies retroactively to taxable years governed by the Revenue Act of 1926, c. 27, 44 Stat. 9, and prior Revenue Acts.

Section 703 of the 1928 Act purports to allow a deduction, either to the estate of a decedent or to the beneficiaries of the estate, on account of estate, inheritance, legacy, or succession taxes "paid or accrued within such taxable year." Paragraphs (1), (2), and (3) of subsection (a) deal with the allowance where the deduction has been "claimed"

either by the estate or by the beneficiaries, or both; and the term "claimed" is defined in Section 703 (b) to mean claimed either in the income tax return of such estate or beneficiaries or in a claim in abatement filed with respect to an assessment made prior to June 2, 1924. None of the provisions of these paragraphs is applicable to the instant case because the deduction was not "claimed" either by the decedent's estate or by the petitioner within the meaning of the statute. Accordingly, petitioner must look to paragraphs (4) and (5) as authority for claiming the deduction involved in this proceeding.

1. The petitioner has not shown that she is entitled to the deduction in question by reason of the provisions of paragraph (4) of Section 703 (a), Appendix, *infra*. That paragraph provides that if the deduction has not been "claimed" either by the estate or the beneficiary it shall be allowed only to the person (either the estate or the beneficiary) who actually paid the tax.

The petitioner has kept her books of account and made her income tax return upon the basis of cash receipts and disbursements. (R. 186.) Accordingly, any deduction which could be claimed for the taxable year 1926 would be limited to amounts actually paid within the taxable year. See Sections 200 and 212 of the Revenue Act of 1926, Appendix, *infra*. The District Court found from the evidence that the amount claimed as a

deduction in this proceeding was not paid by her within the taxable year (R. 190), and therefore correctly disallowed the deduction. Compare *Helvering* v. *Price,* 309 U. S. 409. The Circuit Court of Appeals held that the District Court's finding in this respect was supported by the evidence. (R. 202.) Petitioner's argument before this Court with respect to her claim under paragraph (4) (Br. 10–19) is devoted to a review of the evidence on this question. However, the matters discussed were fully considered by both courts below, and we submit there was no error in their determinations.

2. Nor has petitioner shown that she is entitled to the deduction claimed by reason of paragraph (5) of Section 703 (a), *infra.* That paragraph provides that notwithstanding the provisions of the first four paragraphs, if a claim for the deduction by the estate is barred by the statute of limitations but a claim for the reduction by the beneficiary is not so barred it shall be allowed to the beneficiary, and, conversely, if a claim for the deduction by the beneficiary is barred by the statute of limitations but a claim for the deduction by the estate is not so barred it shall be allowed to the estate.

In order to bring herself within the provisions of paragraph (5), it was incumbent upon the petitioner to allege and prove that a claim by the estate for this deduction was barred by the statute of limitations. In paragraph "seventh" of her petition she so alleged (R. 4). This allegation was de-

nied by the Government in its answer (R. 7–8). At the trial of the case no evidence whatever was offered to support this allegation, and none can be found in the record. No finding with respect to this alleged fact was found by the trial court (R. 186–190), and no reference made to it in the court's opinion (R. 192–195). In the circumstances the Circuit Court of Appeals properly held that the petitioner had failed to show she was entitled to the deduction by reason of the provisions of paragraph (5) (R. 202–203).

Moreover, the petitioner's argument in support of her claim under paragraph (5) (Br. 20–26) is without merit. It is not shown that a claim by the decedent's estate was barred. She is even in error in assuming (Br. 21) that the matter is governed by limitation provisions of the 1934 and subsequent Revenue Acts. The taxable year involved is 1926, and under Section 284 (b) of that Act, c. 27, 44 Stat. 9, three years from the date the tax was paid are allowed within which to file a claim for refund. Certain exceptions to this requirement were provided in cases where a deficiency was determined by the Commissioner and a petition filed with the Board of Tax Appeals. See Section 284 (d) and (e) of the 1926 Act.

The record does not show when the income tax was finally determined or paid by the decedent's estate for 1926, or whether a deficiency was ever determined against the estate for that year. With-

out this information it is impossible to say that a claim by the estate was barred either at the time the petitioner filed her claim or at the time she instituted her suit.

CONCLUSION

There is no conflict of decisions. The decision below is fully supported by the facts and the law. The petition should be denied.

Respectfully submitted.

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JANUARY 1941.

APPENDIX

Revenue Act of 1924, c. 234, 43 Stat. 253:

SEC. 301. (a) In lieu of the tax imposed by Title IV of the Revenue Act of 1921, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 303) is hereby imposed upon the transfer of the net estate of every decedent dying after the enactment of this Act, whether a resident or nonresident of the United States:

* * * * *

(b) The tax imposed by this section shall be credited with the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or Territory or the District of Columbia, in respect of any property included in the gross estate. The credit allowed by this subdivision shall not exceed 25 per centum of the tax imposed by this section.

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 200. When used in this title—

(a) The term "taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under section 212 or 232. The term "fiscal year" means an accounting period of twelve months ending on the last day of any month other than December. The term "taxable year" includes, in the case of a return made for a fractional part of a year under the provisions of this title or under regulations

prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made. The first taxable year, to be called the taxable year 1925, shall be the calendar year 1925 or any fiscal year ending during the calendar year 1925.

* * * * *

(d) The terms "paid or incurred" and "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under section 212 or 232. The deductions and credits provided for in this title shall be taken for the taxable year in which "paid or accrued" or "paid or incurred", dependent upon the method of accounting upon the basis of which the net income is computed under section 212 or 232, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period.

* * * * *

SEC. 212. (a) In the case of an individual the term "net income" means the gross income as defined in section 213, less the deductions allowed by sections 214 and 206.

(b) The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer * * *.

* * * * *

SEC. 214. (a) In computing net income there shall be allowed as deductions:

* * * * *

(3) Taxes paid or accrued within the taxable year except * * *. For the pur-

pose of this paragraph, estate, inheritance, legacy, and succession taxes accrue on the due date thereof except as otherwise provided by the law of the jurisdiction imposing such taxes;

* * * * *

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 703. DEDUCTION OF ESTATE AND INHERITANCE TAXES—RETROACTIVE.

(a) In determining the net income of an heir, devisee, legatee, distributee, or beneficiary (hereinafter in this section referred to as "beneficiary") or of an estate for any taxable year, under the Revenue Act of 1926 or any prior revenue Act, the amount of estate, inheritance, legacy, or succession taxes paid or accrued within such taxable year shall be allowed as a deduction as follows:

(1) If the deduction has been claimed by the estate, but not by the beneficiary, it shall be allowed to the estate;

(2) If the deduction has been claimed by the beneficiary, but not by the estate, it shall be allowed to the beneficiary;

(3) If the deduction has been claimed by the estate and also by the beneficiary, it shall be allowed to the estate (and not to the beneficiary) if the tax was actually paid by the legal representative of the estate to the taxing authorities of the jurisdiction imposing the tax; and it shall be allowed to the beneficiary (and not to the estate) if the tax was actually paid by the beneficiary to such taxing authorities;

(4) If the deduction has not been claimed by the estate nor by the beneficiary, it shall be allowed as a deduction only to the person (either the estate or the beneficiary) by whom the tax was paid to such taxing au-

thorities, and only if a claim for refund or credit is filed within the period of limitation properly applicable thereto;

(5) Notwithstanding the provisions of paragraphs (1), (2), (3), and (4) of this subsection, if the claim of the deduction by the estate is barred by the statute of limitations, but such claim by the beneficiary is not so barred, the deduction shall be allowed to the beneficiary, and if such claim by the beneficiary is barred by the statute of limitations, but such claim by the estate is not so barred, the deduction shall be allowed to the estate.

(b) As used in this section, the term "claimed" means claimed—

(1) In the return; or

(2) In a claim in abatement filed in respect of an assessment made on or before June 2, 1924.

(c) This section shall not affect any case in which a decision of the Board of Tax Appeals or any court has been rendered prior to the enactment of this Act, whether or not such decision has become final.

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